UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE DETROIT NEWS, INC. and
DETROIT NEWSPAPER PARTNERSHIP, L.P.,
a limited partnership, a/k/a DETROIT MEDIA PARTNERSHIP
and DETROIT FREE PRESS, INCORPORATED, general partner [1]

Respondent DN and Respondent DMP

Case 07-CA-132726

DETROIT FREE PRESS, INCORPORATED and
DETROIT NEWSPAPER PARTNERSHIP, L.P.,
a limited partnership a/k/a DETROIT MEDIA PARTNERSHIP
and DETROIT FREE PRESS, INCORPORATED, general partner

Respondent DFP and Respondent DMP

and **Case 07-CA-132729**

NEWSPAPER GUILD OF DETROIT, LOCAL 34022
OF THE NEWSPAPER GUILD/CWA, AFL-CIO

Charging Union

REPLY BRIEF TO RESPONDENTS' RESPONSE BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE

ALJ Susan A. Flynn issued her Decision in this case on August 12, 2015. The General Counsel filed Cross-Exceptions on October 27, 2015. Respondent DN and Respondent DFP replied to the Cross-Exceptions on November 23 and November 24, respectively. Contrary to

[1] The correct names of Respondents were stipulated to by all parties at the hearing. (Tr 11, Jt 37(a) and (b)). In this brief, Respondent DN is referred to as "DN" or "Detroit News"; Respondent DFP is also referred to as "DFP" or "Detroit Free Press." Collectively, Respondent DN, Respondent DFP, and Respondent DMP are referred to as "Respondents." The Charging Union is also referred to as "Union." References to the transcript are: "Tr," and references to the Administrative Law Judge's Decision in this case are: "ALJD."

the positions of Respondent DFP and Respondent DN, the ALJ should have found that Respondents unlawfully failed to bargain concerning the decision to implement unilateral changes to the parking system, as these allegations were clearly plead in the charges and the complaint and litigated at trial. In addition, the ALJ should have determined that a full make-whole remedy was appropriate.

II. ARGUMENT

A. The Charges and Complaints Clearly Set Forth a "Clear and Concise Description of The Acts which are Claimed to Constitute Unfair Labor Practices."

As a preliminary matter, Respondent DFP and Respondent DN repeatedly misconstrue the General Counsel's position when they assert that Counsel for the General Counsel seeks a finding that Respondents had an obligation "to bargain over the decision to sell the Detroit News building and parking lots and to move its business to a new location." (Respondent DFP Brief at 4, 8, 9, 10, 12, Respondent DN Brief at 3, 4, 7, 8)[2] [3] Rather, Counsel for the General Counsel takes the position that Respondents had an obligation to bargain over the changes to the parking policy, which is a distinct matter from the building move. As the ALJ found, Respondents made changes to parking including to "the monthly rate, based on salary, [resulting in parking] costing much more than the prior location and erasing the newly-gained wage increases, requiring an annual commitment, and assigning garages by seniority." (ALJD, slip op. at 18, lines 30-37)

[2] For example, Respondent DFP relies on the testimony from the Union's administrative officer, Lou Grieco, when he agreed that he was not bargaining the decision to move from its old facility to the new facility. (Respondent DFP at 9-10) However, the issue is not whether the facility move should be the subject of bargaining, but whether the new parking plan should be. Respondent DN also distorts the testimony of the Union's administrative officer, Lou Grieco, by claiming that he stated that he had no obligation to bargain over "the decision" without specifying which decision. (Respondent DN Brief at 8, Tr 628)

[3] Respondent DN also claims that that Counsel for the General Counsel "mischaracterizes" the decision at issue as a "decision to change the parking location and costs" when it fact it is the decision to change the parking costs and other parking policies at issue. (DN Brief at 2)

These changes were not required by the building move but constituted a separate set of changes unilaterally imposed by Respondents without bargaining with the Union.

In its Response Brief, Respondent DFP also extraneously reintroduces the topic of whether it refused to bargain over effects of the building move. (Respondent DFP at 12) This is irrelevant to the issue raised in the Counsel for the General Counsel's Cross-Exceptions concerning whether Respondents failed to engage in decisional bargaining and committed unilateral changes with respect to the parking policies. Respondent DFP's arguments concerning whether it engaged in effects bargaining should be disregarded since the Board's Rules and Regulations Sec. 102.46(f)(1) require an answering brief to)"be limited to the questions raised in the Cross-Exceptions." (Respondent DFP Brief at 12) [4]

Respondents assert that they did not have fair warning with respect to the allegation that it had a duty to bargain over the decision to enact parking changes. Respondents (and the ALJ) should have read the amended charges and the Complaints more carefully. The amended charge clearly specified:

> [t]he Employer unilaterally changed terms and conditions of employment regarding employee parking. After receiving notice from the Union invoking the right to bargain, the Employer refused to bargain and instead communicated directly to unit employees a unilateral policy covering employee charges for parking, compensation ranges for different parking charges, periodic payroll deduction of charges, employee selection of parking options, effective dates deadlines, etc." (GC 1(J))

The Complaints state:

11. (a) On about June 16, 2014, Respondents, by Joyce Jenereaux and Mark

[4] Similarly, Respondent DN makes erroneous claims that have no bearing on the issues raised in the Cross-Exceptions. For example, Respondent DN claims "the contract between the Charging Party . . . and the News states that the parking is not a benefit that must be maintained during the life of the contract." This is not the case. The contract is silent with respect to parking. This is irrelevant to the issues under consideration in the Cross-Exceptions (Respondent DN Brief at 2, Jt. 2, p. 23)

> Brown, at Respondents' Detroit facility, announced to Unit employees new parking policies and procedures, including locations and costs.
>
> (b) On about October 27, 2014, Respondents implemented the new parking policies and procedures described in paragraph l1(a).
>
> 17. Respondents engaged in the conduct described above in paragraph 11 without affording the Charging Union a meaningful opportunity to bargain with Respondents **with respect to this conduct** and the effects of this conduct. (GC 1(o) and GC 1(m)) (emphasis added)

In the Complaints, Counsel for the General Counsel also sought a broad make-whole remedy asking that Respondents:

> [u]pon request of the Charging Union, rescind the changes described above in paragraph 11, advise employees in writing or via electronic mail of such rescission, and jointly and severally make whole those affected employees for all out of pocket expenses and loss of other benefits suffered as a result of the change in parking policies and procedures, with interest computed in accordance with Board policy." (GC 1(O) and GC 1(M)).

With respect to the Complaints, the General Counsel met the requirements of Sec. 102.15 of the Board's Rules and Regulations:

> The complaint shall contain . . . (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

The Board has long held that "an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different contexts." ***Artesia Ready Mix***, 339 NLRB 1224, 1226 (2003). (citing ***NLRB v. Piqua Munising Wood Products Co***., 109 F.2d 552, 557 (6th Cir. 1940)). DFP's reliance on ***Bender v. Dudas***, 2006 WL 89831 (D.C. 2006), which is a patent and trademark case, is puzzling in that the court found that the party's "challenge to the sufficiency of the complaint must be rejected" since the complaint was sufficient to provide notice of the violation.

The Complaints in these cases specify the acts that are claimed to constitute unfair labor practices, the announcement of the "new parking policies and procedures, including locations and costs," the implementation of the new parking policies and procedures, and the failure to bargain with the Union concerning the new parking policies and procedures. The Complaints set forth the dates of these acts and identify Jenereaux and Brown as the perpetrators of these acts. Thus, the Complaints satisfy the requirements of Sec. 102.15 of the Board's Rules and Regulations, and Respondents had ample notice that their decision and implementation of the changes to the parking policy without bargaining with the Union was alleged to violate the Act as an unlawful unilateral change. DFP's reliance upon ***NLRB v. Blake Construction Company***, 663 F.2d 272 (1981), is misguided in that the General Counsel in that case failed to plead an 8(a)(5) violation in a complaint which alleged only 8(a)(3). (Respondent DFP Brief at 5) In the instant matter, the General Counsel pled that Respondent's conduct constituted a violation of Section 8(a)(5). (GC 1(O), par. 9, GC 1(M) par. 9)

Assuming, *arguendo*, that the theory of the unilateral change was not clearly advanced in the pleadings and at the hearing, this would not preclude the Board from finding a violation. In ***Hawaiian Dredging Construction Company***, 362 NLRB No. 10 at fn. 6 (February 9, 2015), the Board found:

> [a]lthough the General Counsel neither clearly advanced a ***Wright Line*** theory at the hearing nor excepted to the judge's failure to find a violation under that framework, this does not preclude the Board from doing so . . . . Indeed, the Board, with court approval, has often found violations for different reasons and on different theories from those of administrative law judges or the General Counsel where the unlawful conduct was alleged in the complaint." (citing ***PepsiAmerica, Inc.***, 339 NLRB 986 (2003; ***Jefferson Electric Co.***, 274 NLRB 750, 750-751 (1985), efd. 783 F.2d 679 (6th Circ. 1986)).

In the instant matter, not only did the Complaints contain pleadings concerning Respondents' unilateral changes to parking policies, but the ALJ's failure to rule on the

relevant complaint allegations were also the subject of Counsel for the General Counsel's Cross-Exceptions. Respondent DN claims that the ALJ did rule on the issue of decisional bargaining; however, the lengthy passage from the ALJD cited by Respondent DN does not address the issue of whether an employer has an obligation to bargain with respect to a decision to make changes to a parking policy, which is distinct from a managerial decision -- such as moving the building -- over which an employer has no obligation to bargain. The ALJ did not address Respondents' decision or conduct in unilaterally changing parking policies. (Respondent DN Brief at 6)

B. The Issue of Whether Respondents Unilaterally and Unlawfully Changed the Parking Policies Was Fully Litigated at the Hearing

Contrary to the assertion of Respondent DFP, Counsel for the General Counsel made clear from the opening statement that "this is a case about a unilateral change with respect to employees' parking. This is what is alleged . . . , that the Respondents failed . . . to bargain in good faith with the Union in violation of Section 8(a)(1) and 8(a)(5) of the Act." (Respondent DFP Brief at 3, Tr 66) This opening statement also noted that Respondent DMP announced its plans to assign spaces at a First Street garage on the basis of total annual compensation, giving preference to those in the lower pay ranges and that the DMP notified employees that spaces in the more expensive Financial District garage would be assigned on the basis of seniority, all this without bargaining with the Union. (Tr 70) Similarly, the Charging Union's attorney made clear in his opening statement that "[t]he case in chief we have is very straightforward, a unilateral change regarding employee parking conditions." (Tr 77) The ALJ herself recognized that the Respondents made a unilateral change that was "material, substantial, and significant when the new parking policy was announced on June 16, 2014, and subsequently implemented in October 2014." (ALJD at 23, lines 10-13)

Evidence adduced at the hearing further supported the Complaint allegations that Respondents, by their conduct in unilaterally changing (and deciding to change) the parking policies, violated Section 8(a)(1) and (5) of the Act. The ALJ aptly summarized the changes:

> Shortly before the move, on June 16, 2014, DMP announced a new parking policy by email to employees. Those emails were sent by Jenereaux and Brown. All employees who chose to park at the garages where DMP leased space would be charged more per month than they had previously been charged at the old location. The monthly fees would now be based on salary, rather than flat rates as before. The individual employee's rate would be determined by salary ranges. At best, an employee would pay $60 per month rather than $25 or $30, and at worst, $175 per month. An employee who opted not to park at either of the employer-provided garages would likely pay more at other local lots, or would have to make other commuting arrangements, such as taking public transportation. In their most recent collective-bargaining agreements, employees of both DFP and DN had gained a one per cent raise per year; the new higher parking costs exceeded those amounts, resulting in a net reduction of wages. The request for a parking space was no longer month-to-month, but an annual commitment. Assignment to the closer garage would be determined by seniority, rather than date of request, as in the past. Although one garage was adjacent to the new building, the other garage was three or four blocks away (whereas the old lots were adjacent or one block away). Employees who worked late hours would not be permitted to move their cars to the closer garage after dark. These changes in distance prompted safety concerns. (ALJD slip op. at 17)

Moreover, the ALJ found that:

> Respondents met, but did not bargain, with the Union over the changes in the parking policy. The Respondents agreed to meet to discuss the Union's concerns about parking. Discussing concerns about the already announced policy is not bargaining. At that July 11 meeting, the Respondents emphasized that they had no obligation to bargain about parking. They said the policy that had been announced was not a proposal but the benefit they were offering. At the end of the meeting, the Respondents stated that the parking policy would be implemented. This amounts to presentation to the Union of a fait accompli. While the Respondents permitted the Union to present proposals, the Union was not provided the opportunity for meaningful bargaining. The Respondents had already determined what the new policy would be, announced it to the employees, and only agreed to meet with the Union to discuss its concerns, as a courtesy. The Respondents made it very clear to the Union at the meeting that they were not going to bargain. The Respondents did not bargain but maintained their position that the policy was set, and would be implemented, with minor revisions that they unilaterally determined as well.

Thus, the ALJ found:

> Respondents did not notify the Union of the changes to the parking policy

> before the new policy was announced to all employees on June 16. I find that the Respondents presented the Union with a fait accompli and failed to bargain when the Union requested it. I find that bargaining did not occur at the July 11 meeting. The new policy was implemented in October 2014. Therefore, the Respondents did not provide the Union with prior notice and an opportunity for meaningful bargaining over the changes to the parking policy. (ALJD at 20)

Under this set of facts and findings, contrary to the assertions of Respondents, there must be a determination that Respondents' conduct in deciding upon, announcing, and implementing extensive changes to the parking system, which were not dependent upon the move, constitutes a violation of Section 8(a)(5) and merits a full make-whole remedy, in addition to the remedy ordered by the ALJ under ***Transmarine***, 170 NLRB 389 (1968).[5] Respondent DFP concedes that the Charging Union also sought to bargain "concerning the changes in parking arrangements or costs . . ." and that the Union's administrative officer Lou Grieco testified that he "invoked the right to bargain" in a June 10 email in which he asked to bargain over the effects of the move as well as changes to parking arrangements or costs. (Respondent DFP Brief at 7, GC 29, Jt 4, Tr 478) Respondent DN's own witness, Assistant Editor Michael Brown acknowledged that the Union asserted the right to bargain with respect to the parking issues with this June 10 email. (Tr 860-8611, Jt 8) Significantly, there is no explicit finding in the ALJ's decision that the Union's requests to bargain were limited to effects bargaining. In fact she described the requests more generally, "Union Requests Regarding Parking at the New Building." (ALJD slip op at 5)

C. Contrary to Respondents' Assertions, a Full Make-Whole Remedy is Appropriate

Respondent DFP attempts to distinguish ***Comar, Inc***., 349 NLRB 342 (2007), a case in which both a make-whole remedy and a ***Transmarine*** remedy were imposed, by asserting that

[5] Respondent DN unsuccessfully attempts to distinguish ***Mail Contractors of America***, 347 NLRB 1158 (2006) by asserting that case did not "involve the decision to sell parking facilities." However, the instant matter case also does not involve the decision to sell parking facilities.

the respondent in that case was recalcitrant. Respondent DFP claims that it is not a "recalcitrant" employer and that the egregious unfair labor practices in that case are not present here. However, as in ***Comar, Inc***., Respondents in this case effectively lowered employees' wages significantly, obviating, as the ALJ found, the most recent one percent pay increase gained during the bargaining of the last contract. (ALJD at 18, line 35) In addition, as found by the ALJ, Respondents in the instant matter blatantly engaged in direct dealing. (ALJD at 23, line 30) The ALJ might not have used the word "recalcitrant" but this is a good description of Respondents' conduct at the July 11 meeting at which the ALJ found that Respondents "emphasized that they had no obligation to bargain about parking." (ALJD at 20, line 29). Neither Respondent attempted to distinguish ***Times Herald Printing Co***., 315 NLRB 700, 702 (1994), in which the Board found that both ***Transmarine*** and WARN Act payments were appropriate since the Transmarine payments remedied the respondent's violation to allow for the bargaining of effects, and the WARN Act payments remedied the respondent's violation of its obligation to give advance notice. Nor did either Respondent attempt to distinguish ***Dodge of Naperville***, 357 NLRB No. 183 (2012), a case involving closure of an auto dealership and relocation to another facility with accompanying diminishment of wages and benefits , in which the Board imposed both a make-whole and ***Transmarine*** remedy. Respondent DN asserts that a full make-whole remedy would "require Respondents to expend a great deal of money;" however, whether a respondent must expend funds is not a criteria for determining whether a make-whole remedy is appropriate. (Respondent DN at 9) As in ***Comar***, supra, a true make-whole remedy in this case would "provide victims with the compensation that resulted from the collective-bargaining process," i.e., the newspaper employees would be compensated for the increases in parking costs and be granted relief from Respondents' unilateral changes of past practice with respect to

allocation of spaces, utilization of seniority and income level concerning parking selection which were incurred when Respondents ignored the collective-bargaining process.

III. CONCLUSION

Counsel for the General Counsel respectfully requests that the Board grant its Cross-Exceptions and modify the Administrative Law Judge's Decision accordingly.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Reply Brief to Respondents' Response Briefs to Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge in The Detroit News, Inc. and Detroit Newspaper Partnership, L.P., a limited partnership, a/k/a Detroit Media Partnership And The Detroit Free Press, Incorporated., general partner, Case 07-CA-132726 and

Detroit Free Press, Incorporated and Detroit Newspaper Partnership, L.P., a limited partnership a/k/a Detroit Media Partnership, and The Detroit Free Press, Incorporated, a general partner, Case 07-CA-132729

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